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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAKE QUENTIN STEBLER,

Defendant and Appellant.

B206376

(Los Angeles County
Super. Ct. No. YA066414)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James R. Brandlin, Judge. Affirmed as modified.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec
and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jake Quentin Stebler (appellant) of two counts of attempted, premeditated murder in violation of Penal Code sections 187, subdivision (a) and 664.¹ In both counts, the jury found that appellant had personally used and discharged a firearm within the meaning of section 12022.53, subdivisions (b) through (c). The jury found that, in committing the attempted murder in count 1, appellant had personally used and discharged a firearm causing great bodily injury under circumstances involving domestic violence within the meaning of section 12022.7, subdivision (e). In count 1, the jury also found that appellant had personally used and discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivision (d).

The trial court sentenced appellant to state prison for two life terms and a consecutive term of 49 years. In count 1, the sentence consisted of life and 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), as well as four years for the domestic violence enhancement. In count 2, the trial court imposed life and 20 years for the firearm enhancement under section 12022.53, subdivision (c), to run consecutively to the sentence in count 1. The trial court imposed and stayed the remaining firearm enhancements.

Appellant appeals on the grounds that: (1) the evidence is legally insufficient to establish that the attempted murders of the victims were premeditated, and it was therefore insufficient to support the judgments of conviction under the due process clause of the Fourteenth Amendment; (2) the trial court reversibly erred in failing to independently weigh the evidence and in refusing to reduce the convictions to simple attempted murder since the jury's premeditation findings were contrary to the weight of the evidence; (3) the trial court reversibly erred in refusing to instruct the jurors that they could consider the victim's provocation in determining whether or not appellant should be found guilty of unpremeditated attempted murder, and (4) the enhancement under

¹ All further references to statutes are to the Penal Code unless stated otherwise.

section 12022.7, subdivision (e) must be set aside, and appellant's sentence must be reduced accordingly.

FACTS

Patryce Jackson (Jackson) had been married to appellant for two years at the time of trial, although they had been in a relationship for six years. On October 21, 2006, they lived on West 99th Street in Los Angeles with Malcolm, Jackson's son and appellant's stepson. Appellant had been physical with Jackson throughout their relationship, and appellant was always the aggressor. Jackson acknowledged she had pleaded no contest to assault with a deadly weapon (a knife) and infliction of great bodily injury on a person in 1993.

On the night in question, Jackson telephoned appellant to ask him when he was coming home. Appellant said he would be home at 9:00 p.m., but he did not arrive. They argued over the phone. Appellant arrived at 1:00 a.m. when Jackson was watching television in bed and her son was in bed. Appellant tried to be affectionate, but Jackson pushed him away. They began arguing about his being out with his friends. Jackson went into the bathroom and locked the door. Appellant banged on the door and cursed. When Jackson heard appellant walking away from the door she opened it. Appellant entered the bathroom and gestured at her with his fist. They continued to argue as Jackson and appellant went to the kitchen and then to the dining room.

At one point, appellant entered the bedroom and Jackson "heard him with the gun." She could also see the gun case on the bed from her dining room chair. Jackson tried calling her father, but she could not reach him. Appellant told Jackson that he had something for her father, too. Jackson believed that meant appellant was going to shoot her father. Jackson heard clicks, as if appellant were loading the gun. She told appellant she wanted a divorce and they continued arguing. Appellant said angrily, "We're not going to get a divorce." Jackson told appellant it was cowardly to get a gun.

After a "brief moment," appellant said "'Honey, I love you.'" Jackson believed that he said it in a way that "wasn't the same," and "[she] knew." She said, "'No, I don't believe you. That didn't sound like the way you usually say it.'" Appellant said,

“Honey, no, . . . I’m taking out the bullets.” Jackson heard the bullets still going in the gun. She told appellant she did not believe him, and she went to sit on the couch. She tried to dial 911 but could not get a signal. She did not hear appellant enter the room, but she heard him say, “God, forgive me for what I’m going to do.” Jackson remained sitting cater-corner to appellant because she did not think he would shoot her. Appellant demanded she put the phone down and she said “no,” and that she was calling 911. Appellant said, “Oh, you think I’m a joke.” As Jackson began to rise, appellant shot her. She fell and lay on the ground pretending to be dead.

Jackson knew appellant went to her son’s room because she heard Malcolm yelling, “G, I love you. Don’t. G, I love you. Don’t.” Jackson heard a gunshot. Appellant then came back and shot Jackson again. Jackson then heard him walk outside to his car.

Malcolm S., Jackson’s son, was 16 at the time of the shooting. He was awakened by arguing between Jackson and appellant that night. At one point, the arguing stopped and Malcolm heard the clicking noise of the 12-gauge shotgun. He heard appellant ask the Lord for forgiveness and ask Jackson if she thought he was a joke. He heard his mother say she was going to call the police, and then a shot. After that, appellant went to Malcolm’s room and pointed the gun at Malcolm’s head as Malcolm lay in bed. Malcolm thought he should not just lie there and get shot so he got up and ran towards his closet. Appellant shot at the wall where Malcolm’s head had been. As Malcolm hid behind a laundry bin, appellant shot at him three more times. Malcolm was saying “Stop” and “G., I love you. Don’t do this.” After the fourth shot Malcolm heard appellant leave the room and walk to the living room. Malcolm heard another shot. Malcolm heard appellant leave and he went to his mother. He called an ambulance and a neighbor. Later Malcolm noticed that some of his new clothes that had been on top of the laundry bin where he had hidden had bullet holes in them. Malcolm testified that he had seen appellant drunk and that he spoke a little differently when drunk. On the night of the shooting appellant sounded normal.

At the hospital, Jackson had surgery and a blood transfusion. She still had pellets inside her shoulder at trial. Dr. Frederic Bongard testified that surgery was performed on Jackson's back to treat two shotgun wounds.

Jackson acknowledged that she had once cut appellant on his arm with a box cutter. She did not know the cutter was open. She was taking it to work at the supermarket, and appellant began hitting her during an argument. Jackson denied telling appellant over the telephone on the night of the shooting to "tell those guys to shut the fuck up or I'll kill all them motherfuckers." She denied threatening to get people to jump appellant that evening. Jackson testified that appellant did not appear to be under the influence of PCP or alcohol during the argument and shooting.

On October 21, 2006, at approximately 3:00 a.m., Deputy Reginald Southall of the Los Angeles County Sheriff's Department responded to Jackson's home and found Jackson lying on the living room floor face down, bleeding from the upper back. He noticed three expended shotgun shells in the living room, hallway, and dining room. A live round was found in the hallway. A rifle case was found in the closet of the bedroom the victim shared with appellant. In the second bedroom, Deputy Southall saw a hole in the wall above Malcolm's bed. The hole was made by a shotgun blast.

Deputy Southall explained that a pump shotgun puts one bullet in the chamber when it is racked. The shells found in the home were "double-ought buck 12-gauge" shotgun shells. Deputy Southall put out a broadcast describing appellant and his 2006 Black Chevrolet Impala.

Deputy Spencer Reedy also reported to the scene of the crime and was called away when appellant's vehicle was spotted in Torrance. Deputy Reedy and other deputies tried to stop the car but it did not stop. Deputy Reedy saw the car pass him at a high rate of speed and enter the freeway. Appellant was going at a speed of over 100 miles an hour and the police cars could not keep up. A police helicopter took up the surveillance. The car eventually stopped on a lawn on 9th Avenue. When police arrived, appellant was lying face down in the grass. Deputy Reedy arrested appellant at approximately

4:00 a.m. Deputy Reedy observed no blatant signs of intoxication and did not see any indication that appellant was under the influence of PCP or anything else.

Defense Evidence

Joann Solano (Solano) testified that she had a barbecue at her home on October 20, 2006, and appellant attended. While she was inside her home she heard loud voices outside and she heard Jackson on the speaker phone asking appellant when he was coming home. Jackson sounded angry. She heard appellant answer that he would go when he finished drinking his beer, or finished the game. Jackson telephoned continually. During the last conversation that Solano heard, Jackson said "I will come over there and shoot all -- all the niggers." On the following morning, Solano was awakened by her son, Andre, and she went outside to find a car in her yard and a lot of police cars. Neither Solano nor Andre knew who was arrested in front of their home.

Andre Robertson (Robertson) is appellant's friend. He testified that everyone was drinking malt liquor at the barbecue at his mother's house. Appellant drank beer after beer. He, appellant, and another man went out to the back of the house and smoked several cigarettes dipped in PCP. He heard appellant's telephone ring a couple of times, and he heard appellant's wife asking when he was coming home. Robertson heard them arguing. Afterwards, Robertson and appellant smoked more PCP cigarettes. Robertson thought appellant should not drive home and asked him if he wanted to spend the night. Appellant said he had to go home and drove off on a scooter. Appellant appeared high to Robertson, and he staggered on the porch. When appellant called Robertson to tell him he made it home, Robertson heard Jackson arguing with appellant over the phone. Later on that night, Robertson heard noises in front of his house and saw a car parked on the grass. He did not see appellant. He knew it was appellant's car when he saw a picture of appellant and his wife in the car.

Geno Wilson (Wilson) was also at the barbecue and had known appellant for 15 years. He saw appellant drinking beer. Jackson telephoned appellant and was "cussing him out" and "just going crazy over the phone" He heard her say "I'll come over there and kill all y'all motherfuckers." She called every two or three minutes. Appellant told

her to calm down and that he would come home when he was ready. Wilson saw no outside signs that appellant was bothered by what his wife was saying. He saw appellant return from going to the side of the garage and saw he was moving in slow motion. He had seen PCP cause this reaction. Wilson believed appellant was not in good condition to leave and he tried to prevent him from leaving.

Wilson said that he once went to appellant's home with appellant, and Jackson shut the door on Wilson. Wilson heard the sound of breaking glass and saw appellant going through a window. Appellant told Wilson that Jackson pushed him through the window. He had seen Jackson being physical with appellant quite a few times. Wilson testified that each time there was a fight between appellant and Jackson, Jackson was the one who started it.

Appellant testified that he and Jackson began having arguments in 2002. He loved his wife, but she accused him of cheating. Jackson began telling appellant that she was going to cheat on him, and he felt hurt. On one occasion, appellant came home with Wilson and Jackson pulled appellant inside, slamming the door in Wilson's face. She pushed appellant's elbow through the window. On another occasion, when appellant refused to drive Jackson to work, she got mad and used a box cutter she had in her hand to cut his arm. Appellant received 13 stitches. Jackson also threw a brick at his car because he would not take her somewhere. Jackson would sometimes push him, hit him, scratch his face, and throw things at him. During these altercations he never struck her. He was never violent with her.

On the day of the incident, appellant drank about six beers at the barbecue. He was highly intoxicated and was smoking PCP. He continued drinking and smoking throughout the evening. He drank beer and cognac and smoked five or six PCP cigarettes by himself. When Jackson called him he told her he was drunk, and he suggested she come and get him. Jackson was angry and hostile. She threatened to go over and kill anyone there. She was very loud on the speaker phone. Although he was intoxicated he told the others he had to go home. He felt he was going to pass out.

When appellant arrived home, Jackson helped him bring in his scooter, and she became angry when he called Robertson. She began cursing him, and she pushed him away. He stumbled and lost his balance. She followed him around and argued. She pushed him again, and he fell. She said she was going to call her father, who would do something to him. Appellant took this as a threat and believed Jackson was seriously trying to have her father come over and hurt appellant. Appellant went to the bedroom, opened the closet, and grabbed the gun. He later said he did not remember why he had his gun. He removed the safety from the gun, but he did not remember why. The gun, which he had purchased for self-protection, was always loaded.

Jackson continued to argue with appellant and told him she was going to start seeing “guys on her job.” Appellant “just blacked out.” The effect of the drugs was “really kicking in.” He had no memory of shooting at Jackson or Malcolm, and he would not do anything to hurt Malcolm. Appellant had no memory of leaving the house. He had no memory of being chased by police. He just remembered lying on the grass at Solano’s house, being arrested, and waking up six days later in jail. He later stated he remembered putting the gun back in the bag on the bed. He also remembered being fingerprinted and thrown in a cell and his clothes being taken. He remembered that a detective came to speak with him, and he told the detective he was going to speak to his attorney.

Dr. Gordon Plotkin testified regarding the effects of alcohol on a person’s functioning. The more one drinks the more primitive one becomes. PCP is a central nervous system depressant and, like alcohol, it causes disinhibition. PCP also causes a loss of pain sensation and can give rise to a belligerent state in the user. The combination of alcohol and PCP has a multiplicative synergistic effect. The effect of PCP can last two to eight hours depending on the individual’s regularity of use. The strength of the effect also varies according to whether the person uses it regularly. Dr. Plotkin stated that persons under the influence of PCP can engage in purposeful or goal-driven behavior. They can make choices and engage in deliberate decision-making.

Dr. Plotkin said that alcoholic blackouts are not very common, since the body requires a very high level of alcohol to reach that state. He said that the medical records from the Sheriff's Department indicated appellant was suffering from alcohol withdrawal when he was arrested.

Appellant told Dr. Plotkin that the last thing he remembered was playing cards and dominoes for \$1 a game. Dr. Plotkin believed appellant's description of losing time and waking up six days later was not consistent with a blackout. Dr. Plotkin found that appellant's description of his blackout was the reverse of what normally occurs during a blackout, since the periods of time appellant said he did not remember were the moments of highest sensory input.

DISCUSSION

I. Sufficiency of the Evidence

A. Appellant's Argument

Appellant contends there is no evidence he planned to kill his wife or her son prior to arriving home. According to appellant, the evidence conclusively establishes that the shootings were the unanticipated culmination of a heated quarrel and impulsive acts. Appellant argues that, even assuming the record does not establish that this was a case of heat-of-passion attempted voluntary manslaughter as opposed to attempted murder, the record *does* establish that the shootings were not premeditated. Appellant was not in a state to meaningfully reflect on his actions. He maintains that the manner of the killing was not unusual and does not establish premeditation and deliberation in the absence of evidence of planning or motive. Appellant argues that the convictions must be reduced to simple attempted murder.

B. Proceedings Below

At the hearing on appellant's new trial motion, defense counsel asked the trial court to dismiss the true finding on premeditation and deliberation and to sentence appellant on charges of simple attempted murder. In the alternative, counsel requested the trial court grant his motion for new trial based on the fact that a modified CALCRIM No. 522 instruction was not read to the jury. Counsel argued that this instruction would

have given the jury additional assistance on the subject of provocation as it related to the degree of the crime. Counsel asserted that the instruction would have allowed him to argue that, even if the provocation were not sufficient to reduce the crime from attempted murder to voluntary manslaughter, the jury could still consider provocation to reduce the crime to attempted murder without deliberation and premeditation.

The prosecutor argued that CALCRIM No. 522 was intended for actual murder and not for attempted murder. Moreover, the jury was fully informed regarding sufficient provocation by another instruction.

The trial court denied the motions, stating, “The motion for new trial and the motion for reduction of jury’s verdict are both respectfully denied. I believe that the jurors were properly instructed in this matter. That there’s sufficient evidence to support the jurors’ verdicts and findings.”

C. Relevant Authority

Attempted murder requires express malice, and, on appeal, we do not distinguish between attempted murder and completed first degree murder to determine whether there is sufficient evidence to support the finding of premeditation and deliberation. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8.)

“Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]” (*People v. Perez* (1992) 2 Cal.4th 1117, 1124 (*Perez*).)

“‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.] ‘The process of premeditation and deliberation does not require any extended period of time. ‘The true

test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ [Citation.]” *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

There are three basic, but not exhaustive, categories of evidence that will sustain a finding of premeditation and deliberation: (1) planning activity; (2) motive; and (3) manner of the killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*); see also *Perez, supra*, 2 Cal.4th at p. 1125.) All of these factors need not be present to sustain a finding of premeditation and deliberation. (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

D. Evidence Sufficient

We disagree with appellant and conclude there was substantial evidence of premeditation and deliberation in support of the jury’s verdict. Appellant’s behavior before and during the shootings provides ample evidence of deliberation and premeditation.

As stated in *Anderson*, premeditation and deliberation may be shown by circumstantial evidence. (*Anderson, supra*, 70 Cal.2d at p. 25.) The *Anderson* court identified three types of evidence bearing on premeditation and deliberation as follows: “(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as ‘planning’ activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of ‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a ‘preconceived design’ to take his victim’s life in a particular way for a ‘reason’

which the jury can reasonably infer from facts of type (1) or (2).” (*Anderson, supra*, 70 Cal.2d at pp. 26-27.)

With respect to planning activity and the nature of the shooting, factors one and three, the testimony showed that, while Jackson was trying to get a signal on her telephone, appellant walked into the bedroom and retrieved his gun case from the back of the closet. He put the case on the bed and unzipped it. According to Jackson, he proceeded to load the gun. He had the presence of mind to say, “I’m not going to shoot anyone” and to reassure Jackson by telling her he was removing the bullets. He told Jackson, “I love you” in a way that caused her concern and made her suspicious. Although this planning occurred during a short period of time, it reveals appellant was preparing to fire several shots at his victims. Appellant uttered a prayer asking for forgiveness for what he was about to do and shot Jackson in the back. He proceeded immediately to Malcolm’s bedroom where he aimed the gun at Malcolm’s head. Malcolm pleaded with appellant before appellant pulled the trigger. Appellant had no quarrel with Malcolm, and had not even seen Malcolm that evening. Malcolm jumped from the bed at the last possible moment. The photographs of Malcolm’s room showed a hole above where his head had lain, and there were feathers from the pillow strewn about. Appellant then continued to shoot at Malcolm as he cowered behind the laundry bin, as evidenced by articles of Malcolm’s newest clothing bearing pellet holes. Most telling of all, appellant then went back to where Jackson lay with her back toward him and shot her again. This reveals a manner of killing that was “particular and exacting,” which relates to the third *Anderson* factor. (*Anderson, supra*, 70 Cal.2d at p. 27; see also *People v. Caro* (1988) 46 Cal.3d 1035, 1050.) It has been held that the method of killing alone may be sufficient to find premeditation and deliberation. (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.)

Appellant’s behavior after the shooting also indicates he did not act in a heat of passion. He did not call for help, but immediately left the house with the gun and went to his car. He drove to Torrance where his vehicle was spotted by a police patrol. When police tried to pull him over, he led them on a chase at such high speeds that the police

cars could not keep up, and the police helicopter had to track him. Somewhere during his flight he disposed of the shotgun. When appellant finally gave up, he lay on the ground and waited for police.

We also note the record shows that arguments between Jackson and appellant over the issue of his staying out with his friends were a habitual occurrence. On the night in question, the arguing went on for some time before appellant shot Jackson. There was no indication that anything occurred that was unusual in the relationship between the two.

In sum, appellant's argument that there was insufficient evidence of premeditation and deliberation is without merit. Appellant may have arrived at his decision to commit the act in a short period of time, but his act does not bear the characteristics of a rash impulse. Appellant shot at his victims several times at close range, and he had to rack the gun each time he shot in order to place a bullet in the chamber.

Although the second *Anderson* factor, relating to motive, may not be clear in the instant case, Supreme Court decisions subsequent to *Anderson* have emphasized that the factors set out in *Anderson* are merely, as stated, categories of evidence to be used as a framework in analyzing the sufficiency of the evidence of premeditation and deliberation. (See *Perez, supra*, 2 Cal.4th at p. 1125; *People v. Thomas* (1992) 2 Cal. 4th 489, 517.) The *Perez* court emphasized that these factors are by no means the exclusive means of showing premeditation. (*Perez, supra*, at p. 1125.) Although the precise motive is unclear in this case, an absence of motive is not dispositive. (See *People v. Thomas, supra*, 2 Cal.4th at p. 519 [even a random, but premeditated, killing supports a verdict of first degree murder].) Also, the fact that the planning activity in this case was not elaborate case does not foreclose a finding of sufficient evidence of premeditation. (*People v. Millwee* (1998) 18 Cal.4th 96, 134.) As stated in CALCRIM No. 601, premeditation and deliberation are not measured by the length of time a person spends considering whether to kill. (See *People v. Bolin* (1998) 18 Cal.4th 297, 332.)

As long as there is reasonable justification for the findings made by the trier of fact, a reviewing court's opinion that contrary findings might also have been reasonable does not require a reversal. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Appellant's

argument that there was insufficient evidence of premeditation and deliberation is without merit.

II. New Trial Motion

A. Appellant's Argument

As noted previously, defense counsel moved for a new trial based on the failure to read CALCRIM No. 522 and, in the alternative, asked the trial court to dismiss the true finding on premeditation and deliberation and to sentence appellant on simple attempted murder. Appellant contends the trial court used the incorrect standard in denying his motion for a new trial. Appellant complains that the trial court did not say that it had independently weighed the evidence and determined that the jury's premeditation finding was supported by the weight of the evidence.

B. No Error

Respondent contends that appellant has forfeited his claim because the motion for new trial was not based on the insufficiency of the evidence. The motion was based solely on the trial court's failure to instruct with the modified version of CALCRIM No. 522, which would appear to be a motion under section 1181, subdivision 5.² The standard appellant claims the trial court failed to employ—that of the court acting as a 13th juror—is the standard a trial court must use when denying a new trial motion based on insufficiency of the evidence under section 1181, subdivision 6.³ (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6.)

² Section 1181, subdivision 5 provides in pertinent part that the court may grant a new trial: "When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, . . ."

³ Section 1181, subdivision 6 provides that the court may grant a new trial: "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

It is true that a motion for a new trial in a criminal matter must be made orally and on specified grounds. (See, e.g., *People v. Taylor* (1967) 250 Cal.App.2d 367, 372; *People v. Grake* (1964) 227 Cal.App.2d 289, 292.) A ground not argued to the trial court is not cognizable on appeal as a claim of error. (See, e.g., *Wheeler v. Bolton* (1891) 92 Cal. 159, 167 [review of order denying new trial limited to “the grounds upon which the new trial was asked”].) However, subdivision 6 of section 1181 discusses the preferred remedy if the verdict that is “contrary to law or evidence” is nevertheless sufficient to show that the defendant is guilty of a lesser degree of the crime of which he was convicted. (§ 1181, subd. 6.) This remedy—modification of the verdict to the lesser offense—is precisely what appellant asked for. Thus, appellant’s motion may be deemed to have been an inartfully phrased motion under subdivision 6 of section 1181. Appellant merely omitted the first clause of subdivision 6 of section 1181. Therefore, we believe it would be an overly narrow interpretation of appellant’s motion to conclude he has forfeited the instant claim.

We nevertheless disagree with appellant’s argument. In making a determination under section 1181, subdivision 6, a court “must use its own judgment and cannot rely on the jury’s conclusions. [Citation.]” (*People v. Price* (1992) 4 Cal.App.4th 1272, 1275 (*Price*)). Here, the trial court’s words, i.e., “*I believe that the jurors were properly instructed in this matter. That there’s sufficient evidence to support the jurors’ verdicts and findings[]*” indicate that the court itself believed, in the manner of a 13th juror, that the evidence was sufficient. In *Price*, for example, the trial court stated in denying the new trial motion, ““Okay. And, counsel, I did read and consider the points and authorities, and I didn’t take it lightly, but I respectfully deny the request for a new trial. I think the evidence was sufficient, and I think that the jury—there was enough evidence there for the jury to do what the jury did . . .”” (*Price, supra*, at p. 1275, italics omitted.) The appellate court observed that the trial court first stated that it believed the evidence was sufficient, and only after making this statement did the court refer to the jury. Therefore, the court’s exercise of its independent judgment was shown, and the reference

to substantial evidence to support the jury's verdict was mere surplusage. (*Ibid.*) The same occurred in the instant case.

Finally, we believe the trial court properly denied the motion. "Because of the trial court's unique position to perform these duties an appellate court will not set aside such rulings except where it clearly appears the trial court abused its broad discretion. [Citation.]" (*Price, supra*, 4 Cal.App.4th at p. 1275.) Given the evidence produced at trial, we conclude the trial court did not abuse its discretion in arriving at its conclusion.

As we have expressed previously, there was strong evidence of premeditation and deliberation. In contrast, appellant's evidence to the contrary was weak. Although appellant and other defense witnesses testified to appellant's excessive consumption of malt liquor and PCP cigarettes, the jury was not obliged to accept this testimony as true. Appellant was able to drive home on a motor scooter without incident. He was able to load his gun, according to the prosecution witnesses, and fire numerous times. In Jackson's case, he hit his target two times. In Malcolm's case, he narrowly missed. Afterwards he drove his car at high speeds without incident.

Appellant's claims of blacking out were less than credible and rife with contradictions. He at first testified that he remembered nothing from the time he released the safety mechanism on his gun. He had no memory of shooting at Jackson or Malcolm or of leaving the house. He had no memory of being chased by police. He just remembered lying on the grass at Solano's house and being arrested and waking up six days later in jail. He later stated, however, that he remembered putting the gun back in the bag on the bed. He also remembered being fingerprinted and thrown in a cell and his clothes being taken. He remembered that a detective came to speak with him, and he told the detective he was going to speak to his attorney. Appellant's own expert witness was skeptical of appellant's description of his blackout period, since it was the opposite of what normally occurs during such blackouts.

We conclude appellant's argument is without merit. The trial court in this case complied with the standard set out by the California Supreme Court in *People v. Robarge* (1953) 41 Cal.2d 628, which was to "consider the proper weight to be accorded to the

evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.” (*Id.* at p. 633.) There was no due process violation and the trial court did not abuse its discretion by denying the new trial motion or appellant’s request to reduce the degree of his offense.

III. Trial Court’s Refusal of Modified CALCRIM No. 522 Instruction

A. Appellant’s Argument

Appellant contends there was overwhelming evidence that Jackson provoked appellant in numerous ways over a substantial period of time before he shot her. Therefore, the trial court’s refusal to give its own modified version of CALJIC No. 522⁴ was error, since the result was that the jury was not instructed that it could consider provocation in determining whether or not this was a case of premeditated or unpremeditated attempted murder. The jury was instructed only that it could consider provocation in deciding between attempted murder or attempted voluntary manslaughter committed in the heat of passion. According to appellant, the error was not harmless, since none of the other instructions informed the jury that it could convict appellant of unpremeditated, simple attempted murder if the jury members were convinced that Jackson’s provocation played a part in inducing the shootings. Appellant argues that the trial court’s refusal necessitates a reversal and remand for new trial.

⁴ The version of CALCRIM No. 522 that the trial court withdrew read as follows: “Provocation may reduce an attempted murder from willful, deliberate, and premeditated attempted murder to simple attempted murder and may reduce attempted murder to attempted voluntary manslaughter. The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed attempted murder but was provoked, consider the provocation in deciding whether the crime was willful, deliberate and premeditated or not. Also, consider the provocation in deciding whether the defendant committed attempted murder or attempted voluntary manslaughter.”

B. Proceedings Below

Prior to the reading of instructions, the prosecutor addressed the court regarding “the court’s edited version” of CALCRIM No. 522. The prosecutor argued that there was no sua sponte duty for the court to give the instruction. The prosecutor believed the instruction would confuse the jurors because provocation is defined in the attempted voluntary manslaughter instruction.

Defense counsel stated that the trial court should give the instruction because, if the jury did not believe that attempted voluntary manslaughter was the appropriate verdict, it could still consider the provocation on the issue of premeditation and deliberation.

The prosecutor reiterated that provocation was described in CALCRIM No. 603.⁵ Having two different areas describing provocation would be confusing to the jurors.

⁵ CALCRIM No. 603 was read to the jury as follows: “An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion. The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if, one, the defendant took at least one direct but ineffective step toward killing a person; two, the defendant intended to kill that person; three, the defendant attempted the killing because he was provoked; four, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment; and five, the attempted killing was a rash act done under the influence of intense emotion that obscured the defendant’s reasoning or judgment. Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. In order for heat of passion to reduce an attempted murder to attempted voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked, and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked, and how such a person would react in the same situation, knowing the same facts. If enough time has -- strike that. If enough time

Moreover, the standard CALCRIM No. 522 instruction is based on the degrees of murder rather than on attempted murder being reduced to voluntary manslaughter. The trial court agreed that CALCRIM No. 603 described provocation and that CALCRIM No. 522 was designed for murder cases. The trial court stated that the prosecutor's objection was well-taken and withdrew the modified version of CALCRIM No. 522. As noted previously, defense counsel filed a new trial motion based on the trial court's failure to instruct with the modified version of CALCRIM No. 522.

C. Relevant Authority

A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Grant* (1988) 45 Cal.3d 829, 847.) A trial court is not obliged to give a pinpoint instruction even when it is requested if it is not supported by substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 214-215; *People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) CALCRIM No. 522, like its predecessor, CALJIC No. 8.73,⁶ is not an instruction on a substantive offense or defense, but rather a pinpoint instruction relating the evidence to the premeditation and deliberation elements of first degree murder. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-879 (*Rogers*); *People v. Lee* (1994) 28 Cal.App.4th 1724, 1732-1734.)

passed between the provocation and the attempted killing of a person -- let me restart. If enough time passed between the provocation and the attempted killing for a person of average disposition to cool off' and regain his or her clear[] reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis. The People have the burden of proving beyond a reasonable doubt that the defendant did not attempt to kill as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted murder."

⁶ CALJIC No. 8.73 provides: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

The California Supreme Court has held: “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]” (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753-754; *People v. Holt* (1997) 15 Cal.4th 619, 677 [instructions are not considered in isolation].) In addition, “[t]he failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. [Citations.]” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277; *People v. Honeycutt* (1946) 29 Cal.2d 52, 60-62.)

D. No Error

As stated previously, “We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. [Citations.]” (*People v. Herrera, supra*, 70 Cal.App.4th at pp. 1462-1463, fn. 8.) To warrant the reading of CALCRIM No. 522, there must be substantial evidence from which the jury could find the defendant’s decision to kill was a direct and immediate response to provocation such that the defendant acted without premeditation and deliberation. (See *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 329 (*Wickersham*).) The *Wickersham* court explained that the evidence of provocation must “justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately” (*Wickersham, supra*, at p. 329, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 199-201.)

In the instant case, as we have discussed in connection with the heat of passion issue, there is insufficient evidence in the record to suggest that appellant acted as a direct response to provoking conduct by Jackson. On the contrary, Jackson’s behavior on the night of the shooting was characteristic of her interactions with appellant over the past several years. Appellant, however, testified that he was always calm, although he could not remember if his voice was calm on the night of the shooting. He said he was probably arguing back at Jackson but it was not very loud. Consequently, in our view,

there was insufficient evidence of provocation to justify an instruction with CALCRIM No. 522, and the court properly rejected appellant's request for it.

Furthermore, even assuming the trial court erred in rejecting CALCRIM No. 522, appellant cannot show prejudice because the factual question posed by the instruction was resolved by the jury under other properly given instructions that conveyed the distinctions between attempted murder with premeditation and deliberation and attempted murder without these characteristics. The jury was instructed with CALCRIM No. 601, which fully explained the criteria for determining the truth of the allegation that the attempted murder was done willfully and with deliberation and premeditation. All three terms were explained. CALCRIM No. 601 informed the jury that "a decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." CALCRIM No. 603 states that "provocation" occurs when someone of average disposition is made to act rashly and without due deliberation—from passion rather than from judgment. The jury was instructed that it must decide "whether the defendant was provoked and whether the provocation was sufficient." In determining the latter question, the jury was told to "consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts." Read together, these instructions gave the jury guidance in considering evidence of provocation to determine whether the attempted murder was a premeditated and deliberate one. Nothing prevented the jury from giving the provocation evidence its due weight, and the jury nonetheless rejected appellant's provocation theory. (See *People v. Wharton* (1991) 53 Cal.3d 522, 572 (*Wharton*).)

In *Rogers*, the California Supreme Court noted that CALJIC No. 8.73, the predecessor to CALCRIM No. 522, was based on the case of *People v. Valentine* (1946) 28 Cal.2d 121 (*Valentine*), in which the court "suggested the instructions on heat-of-passion voluntary manslaughter were misleading because the jury might have understood them as implying that provocation that was inadequate to reduce the murder to manslaughter was irrelevant to any issue." (*Rogers, supra*, 39 Cal.4th at pp. 879-880.)

Rogers observed that the trial court in *Valentine* had given several erroneous instructions on first and second degree murder and stated that “*Valentine* does not stand for the general proposition that the standard heat-of-passion voluntary manslaughter instructions are always misleading in a homicide case where the jury is instructed on premeditated murder and there is evidence of provocation, or that such manslaughter instructions always must be accompanied by instructions on the principle of inadequate provocation set out in CALJIC No. 8.73. In the absence of instructional errors such as were present in *Valentine*, the standard manslaughter instruction is not misleading, because the jury is told that premeditation and deliberation is the factor distinguishing first and second degree murder. Further, the manslaughter instruction does not preclude the defense from arguing that provocation played a role in preventing the defendant from premeditating and deliberating; nor does it preclude the jury from giving weight to any evidence of provocation in determining whether premeditation existed.” (*Rogers, supra*, at p. 880.)

In the instant case, there were no erroneous jury instructions on attempted murder, attempted voluntary manslaughter, or on the premeditation and deliberation allegation. Transposing the *Rogers* reasoning to the instant case, where we are addressing premeditated attempted murder and simple attempted murder rather than first or second degree murder, we believe the instructions given in this case were not misleading, and the jury had adequate direction in resolving the issues of premeditation and deliberation.

We conclude that the trial court properly withdrew the modified CALCRIM No. 522 instruction. As we have discussed elsewhere in this opinion, there was strong evidence of premeditation and deliberation. Therefore, in view of the evidence introduced at trial and the instructions that were given, even if error could be found in not reading the instruction, the error would be deemed harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Wharton, supra*, 53 Cal.3d at pp. 571-572; *People v. Watson* (1956) 46 Cal.2d 818, 836.) There is no ground for reversal.

IV. Enhancement Under Section 12022.7, Subdivision (e)

Appellant contends the trial court erred in sentencing appellant to an additional four years under section 12022.7, subdivision (e), which provides additional punishment

for personally inflicting great bodily injury under circumstances involving domestic violence, as well as an additional 25 years for the firearm-use enhancement under section 12022.53, subdivision (d). Appellant points out that section 12022.53, subdivision (f) specifically prohibits imposition of the domestic violence enhancement when the firearm-use enhancement is imposed. Therefore, appellant’s sentence should be reduced by four years. Respondent concedes this issue.

As appellant points out, section 12022.53, subdivision (f) provides in pertinent part that “[a]n enhancement for great bodily injury as defined in Section 12022.7, . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).” Therefore, since the trial court imposed an enhanced term on count 1 of 25 years to life under section 12022.53, subdivision (d), the four-year enhancement under section 12022.7 must be stricken.

DISPOSITION

The judgment is modified to strike the four-year enhancement imposed in count 1 under section 12022.7, subdivision (e) of the Penal Code. In all other respects the judgment is affirmed. The superior court is directed to amend the abstract of judgment accordingly and to forward a corrected copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ